Nos. 98-652, 98-653

Supreme Court, U.S.
FILED
DEC 17 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1998

SBC COMMUNICATIONS INC., *et al.*,

Petitioners,

against

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE REGULATORY COMMISSIONS IN OPPOSITION

LAWRENCE G. MALONE
General Counsel to the
Public Service Commission
Of the State of New York
Three Empire State Plaza
Albany, NY 12223-1350
(518) 474-2510

Dated: December 18, 1998
Albany, NY

(Attorneys continued on inside of cover)

THURBERT BAKER
Attorney General as
Counsel to Georgia Public
Service Commission
47 Trinity Avenue, SW
Atlanta, Georgia 30334
(404) 651-9401

DIANE MUNNS
General Counsel
Utilities Division
Iowa Department of Commerce
350 Maple Street
Des Moines, Iowa 50319-0069
(515) 281-3448

SHELDON M. KATZ
Special Counsel
Vermont Department of
Public Service
112 State Street
Montpelier, Vermont 05601
(802) 828-4014

KAREN FINSTAD HAMMEL
Special Assistant Attorney
General Montana Public
Service Commission
P.O. Box 202601
Helena, Montana 59620-2601
(406) 444-6179

MARYANNE REYNOLDS MARTIN
Assistant Counsel
BOHDAN R. PANKIW
Acting Chief Counsel
Pennsylvania Public Utility
Commission and Commissioners
203 North Office Building
P.O. Box 3265
Harrisburg, PA 17055
(717) 787-4518

MYRA L. KAREGIANES
General Counsel
Illinois Commerce Commission
160 N. LaSalle, Suite C-800
Chicago, Ill 60601
(312) 793-8184

DAVID A. VOGES
Assistant Attorney General and
Counsel to the Michigan Public
Service Commission
6545 Mercantile Way, #15
Lansing, Michigan 48911
(517) 334-7667

PENNY BAKER
Deputy General Counsel
Missouri Public Service
Commission
P.O. Box 360
Jefferson City, Missouri 65102
(573) 751-6651

(Attorneys Continued)

CHARLES D. GRAY
J. BRADFORD RAMSAY
National Association of Regulatory Utility Commissioners
1100 Pennsylvania Avenue, NW
Suite 603 - Box 684
Washington, DC 20044-0684
(202) 898-2200

MICHAEL S. VARDA
Legal Counsel
Telecommunications Division
Public Service Commission of Wisconsin
P.O. Box 7854
Madison, Wisconsin 53707-7854
(608) 267-3591

W. BENNY WON
Assistant Attorney General
Public Utility Commission of Oregon
100 Justice Building
Salem, Oregon 97310
(503) 378-4620

THE REPORTER COMPANY, *Printers and Publishers, Inc.*
181 Delaware Street, Walton, NY 13856—800-252-7181
(4990 – 1998)

Printed on Recycled Paper

QUESTIONS PRESENTED

1. Whether the Telecommunications Act of 1996's "Special Provisions Concerning Bell Operating Companies" (47 U.S.C.§§271-275), which allow 20 companies to compete in the interLATA telecommunications market if certain conditions are met, violate the Bill of Attainder Clause, the separation of powers or the guarantee of equal protection?

2. Whether the challenged "Special Provisions" are severable from the remainder of the Telecommunications Act of 1996?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

STATEMENT OF THE CASE 2

A. Introduction 2

B. Regulatory Background 3

C. The Telecommunications Act of 1996 4

ARGUMENT 6

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONS DO NOT RAISE A NOVEL QUESTION OF NATIONAL IMPORTANCE 6

A. The Fifth Circuit's Decision Applies Well Established Principles 6

1. The Telecommunications Act's Special Provisions Do Not Violate The Bill Of Attainder Clause 7

a. The Bell Operating Companies Have Not Been Punished 9

i. Sections 271-275 Do Not Fall Within The Historical Meaning of Punishment 10

ii. The Act Furthers Legitimate Non-punitive Goals. 12

iii. Sections 271-275 Display No Punitive Intent 14

b. The Fifth Circuit's Decision Is Consistent With Relevant Precedent And The Protections Provided By The Bill of Attainder Clause 15

c. This Court Should Deny Review As It Has Clearly And Repeatedly Set Forth The Bill Of Attainder Test And The Fifth Circuit's Decision Complies With That Test 16

2. The Special Provisions Do Not Violate The Separation of Powers Clause 16

3. The Petitioners' Equal Protection Claim Does Not Present A Question Warranting This Court's Review 18

B. Sections 271-275 Cannot Be Severed From The Act 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases: **Page**

Alaska Airlines, Inc. v. Brock, 480 U.S. 678 (1987) 19

American Paper Inst., Inc. v. American Electric Power Serv. Corp., 461 U.S. 402 (1983) 11, 15

Atchison, T. & S. F. Ry. v. Matthews, 174 U.S. 96 (1899) .. 19

Bellsouth Corp. v. Federal Communications Comm'n, 144 F.3d 58 (D.C. Cir. 1998) 16

Communist Party of U.S. v. Subversive Activities Control Board, 367 U.S. 1 (1961) 12

Cummings v. State of Missouri, 71 U.S. (4 Wall) 277 (1866) 10, 12

DeVeau v. Braisted, 363 U.S. 144 (1960) 14

Erb v. Morasch, 177 U.S. 584 (1900) 18

Federal Communications Comm'n v. Beach Communications, Inc., 508 U.S. 307 (1993) 18

Federal Communications Comm'n v. National Citizens Comm. for Broadcasting, 436 U.S. 775 (1978) 11

Flemming v. Nestor, 363 U.S. 603 (1960) 14

Fresno Rifle Pistol Club, Inc. v. Van de Kamp, 965 F.2d 723 (9th Cir. 1992) 8

Ex parte Garland, 71 U.S. (4 Wall) 333 (1866) 10

Hawker v. New York, 170 U.S. 189 (1898) 14

Lehnhausen v. Lakeshore Auto Parts Co., 410 U.S. 356 (1973) 18

Long Island Lighting Co. v. Cuomo, 666 F. Supp. 370 (N.D.N.Y 1987) *vacated as moot*, 888 F.2d 230 (2d Cir. 1989) 10

MCI Telecommunications Corp. v. Federal Communications Comm'n, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978) 11, 15

Maine Central R.R. Co. v. Brotherhood of Maintenance of Way Employees, 813 F.2d 484 (1st Cir. 1987) 18

Mistretta v. United States, 488 U.S. 361 (1989) 6

Nebbia v. New York, 291 U.S. 502 (1934) 11

New Orleans v. Dukes, 427 U.S. 297 (1976) 18

Nixon v. Adminstrator of Gen'l Servs., 433 U.S. 425 (1977) 7, 8, 9, 10, 12, 14, 16

Plaut v. Spendthrift Farms, 514 U.S. 211 (1995) 7, 17

Reno v. American Civil Liberties Union, 117 S. Ct. 2329 (1997) 6

Robertson v. Seattle Audubon Society, 503 U.S. 429 (1992). 17

SBC v. Federal Communications Comm'n, 154 F.3d 226 (5th Cir. 1998) 2, 9, 13, 15

Selective Serv. Sys. v. Minnesota Public Interest Research Group, 468 U.S. 841 (1984) 7, 9, 12, 14, 15, 16

South Carolina v. Katzenbach, 383 U.S. 301 (1966) 10

Tennessee Elec. Power Co. v. Tennessee Valley Auth., 306 U.S. 118 (1939) 15

U.S. ex rel. Kelly v. Boeing Co., 9 F.3d 743 (9th Cir. 1993) .. 6

United Nuclear Corp. v. Cannon, 553 F. Supp. 1220 (D.R.I. 1982) 9, 11

United States v. Brown, 381 U.S. 437 (1965) 7, 8, 10, 11

United States v. Carlton, 512 U.S. 26 (1994) 6

United States v. GTE Corp., 603 F. Supp. 730 (D.D.C. 1984) 8

United States v. Lovett, 328 U.S. 303 (1946) 7, 9, 10, 14

United States v. Western Electric Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983) 1, 2, 3, 13

United States v. Western Electric Co., 569 F. Supp. 990 (D.D.C. 1983) 2

CONSTITUTION

U.S. Const. art. III, §1 3

U.S. Const. Amend. V 3

U.S. Const. art. I, §10, cl. 1 ..... 3, 7

STATUTES

Banking Act of 1933, 12 U.S.C. §24(7) 11

Federal Credit Union Act, 12 U.S.C. §1759 11

47 U.S.C. §160 ..... 5, 12

47 U.S.C. §§271-275 ..... *passim*

Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. App. 520(4) 17

LEGISLATIVE MATERIALS

141 Cong. Rec. H8276 (daily ed. Aug. 2, 1995) (remarks of Rep. Holden) 13

141 Cong. Rec. S697 (daily ed. Aug. 2, 1995) (remarks of Sen. Kerry) 13

141 Cong. Rec. S8138 (daily ed. June 12, 1996) (remarks of Sen. Kerry) 20

142 Cong. Rec. S688 (remarks of Sen. Hollings) 20

H.R. Conf. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 124 14

H.R. Rep. No. 103-559, pt. 2, at 93 (1994) 8, 18

H.R. Rep. No 103-559, pt. 1, at 131 (1994) 19

H.R. Rep. No 104-203, pt. 1, at 32 (1995) 18

S. Rep. No. 103-367, at 30 (1994) 13, 19

MISCELLANEOUS

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, 11 F.C.C.R. 154999, ¶42 (Aug. 9, 1996) 4

Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 Hastings Const. L.Q. 767 (1973) 7

No. 98-652, 98-653

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1998

SBC COMMUNICATIONS INC., *et al.*,

Petitioners,

-v-

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF STATE REGULATORY COMMISSIONS IN OPPOSITION

The State Regulatory Commissions respectfully oppose the petitions for writs of certiorari.

The Court of Appeals for the Fifth Circuit, relying on the plain text of the Telecommunications Act of 1996 (the "1996 Act"), the Modified Final Judgment (MFJ) (*see United States v. Western Electric Co.*, 552 F. Supp. 131, 161, 226-234 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)), and this Court's holdings, concluded that the Special Provisions do not constitute an unconstitutional bill of attainder and are consistent with the separation of powers and equal

protection clauses. *SBC v. Federal Communications Comm'n*, 154 F.3d 226 (5th Cir. 1998). Inasmuch as the Fifth Circuit simply applied well established precedent to often raised issues, the questions raised by the petitions fall far short of this Court's threshold for certiorari.

Statement of the Case

A. Introduction

The MFJ (*see United States v. Western Electric Co.*, 552 F. Supp. 131, 161, 225-234 (D.D.C. 1982), *aff'd sub nom.*, *Maryland v. United States*, 460 U.S. 1001 (1983)), categorically prohibited the Bell Operating Companies (BOCs) from competing in the long distance services market. In the Telecommunications Act of 1996, Congress lifted the MFJ's restrictions on BOCs replacing them with the "Special Provisions Concerning Bell Operating Companies." 47 U.S.C. §§271-275. These transitional requirements eliminate several prior restrictions and provide BOCs with an ability to overcome other previously imposed restrictions. Specifically, the bar on BOC provision of interLATA[1] services originating outside its region is completely removed, and if a BOC meets certain requirements, including allowing competitors access to its local telephone markets, it can now provide interLATA service originating within its own region.

The Court of Appeals for the Fifth Circuit followed this Court's precedent construing the Bill of Attainder Clause in

---

[1] In implementing the MFJ, the district court established numerous local access and transport areas (LATAs) within which the BOCs were permitted to operate and provide telephone services. *See United States v. Western Electric Co.*, 569 F. Supp. 990, 993-04 (D.D.C. 1983). "InterLATA" service is commonly known as "long distance" service.

determining that the Special Provisions are not a bill of attainder. (U.S. Const. art. I, §10, cl. 1). It decided that Congress' replacement of the MFJ's restrictions with the Special Provisions does not violate the separation of powers clause (U.S. Const. art III, §1). The Fifth Circuit also followed this Court's precedent and concluded that the Special Provisions, as economic regulation, do not violate the guarantee of equal protection (U.S. Const. Amend. V).

The Fifth Circuit's decision does not merit review. This Court has established that punishment is required for a bill of attainder to be found. The Fifth Circuit's determination that punishment is lacking is correct, as the provisions in question are more permissive than those which the provisions replaced. Moreover, the Special Provisions were adopted to achieve an important, non-punitive purpose, a competitive market in the provision of telecommunications services. Finally, there is no valid argument of a violation of the separation of powers, or the guarantee of equal protection. The Fifth Circuit's decision is consistent with precedent and there is no novel issue presented to this Court.

B. Regulatory Background

Under the MFJ, AT&T divested itself of twenty-two local exchange subsidiaries, the Bell Operating Companies (BOCs). Divestiture was required because, "[t]he key to the Bell System's power to impede competition has been its control of local telephone services." *United States v. Western Electric Co.*, 552 F. Supp. at 223, *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983).

Although the MFJ allowed the BOCs to retain their state-regulated local service monopolies, it subjected the BOCs to various restrictions, including categorical bars from competing in the markets for: 1) interLATA communications; 2) telecommunications equipment;

and 3) information services (including electronic publishing and alarm monitoring). *Id.* at 224. Further, even though every BOC encompassed several local access and transport areas (LATAs), each BOC was only allowed to transmit telecommunications information between points within a single LATA (traditional local service). These restrictions were imposed on the BOCs:

> to ensure that they will not misuse their monopoly power....This standard requires that the Operating Companies be prohibited from providing long distance services, and information services, and from manufacturing equipment used in the telecommunications industry. Participation in these fields carries with it a substantial risk that the Operating Companies will use the same anticompetitive techniques used by AT&T in order to thwart the growth of their own competitors.

Id. Other local exchange carriers (LECs) were not subjected to the MFJ's restrictions.

After the MFJ, state legislatures and regulatory agencies began to encourage competition in their local markets. Local competition was slow in developing, however, due to obstacles imposed by the local service monopolists, the BOCs. Nonetheless, many aspects of the FCC's regulations implementing the Act used the states' activities as a framework. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 F.C.C.R. 154999, ¶42 (Aug. 9, 1996).

C. The Telecommunications Act of 1996

The Telecommunications Act of 1996 revamped telecommunications law, requiring competition for both local and long distance services. In reshaping the field of telecommunications, Congress sought to encourage competitive entry into local markets, while providing

BOCs the opportunity to enter the long distance services market. 47 U.S.C. §271.

BOCs are now categorically free to compete out of region. Congress required, however, that a BOC seeking to enter the long distance market in-region show that: (1) it has competitors in its local services market; or (2) no competitor had attempted to enter its local services market in the ten months following enactment of the Act. 47 U.S.C. §§271 (c)(1)(A) and (B). Section 271(c)(2) also sets forth the terms for competitive access that a BOC must provide. Thus, the 1996 Act categorically removed many of the MFJ's restrictions and directly advised BOCs how to remove the remaining restrictions.[2] Moreover, none of the restrictions is permanent.[3]

---

[2] In accordance with Rule 15(2) of the Supreme Court, it is noted that the petitioners do not present an entirely accurate version of the Special Provisions. Section 271 now categorically allows a BOC to provide interLATA services originating outside its in-region states, and provide incidental interLATA services originating in any state. A BOC is also allowed to provide interLATA services originating in its region if the FCC finds it satisfies the 14 point "competitive checklist" in section 271(d)(3). In addition, under section 273, BOCs are not prohibited from engaging in close collaborations with any manufacturer during the design and development stages, nor are BOCs prohibited from engaging in research activities related to manufacturing. Further, section 274 does not prohibit a separate affiliate or electronic publishing joint venture from providing electronic publishing, and it provides a BOC who had been offering any electronic publishing services prior to the Act one year from the date of enactment to comply with the section's requirements. Lastly, although section 275 does impose restrictions on BOCs' providing alarm monitoring services, this section does not affect a BOC that was providing alarm monitoring services as of November 30, 1995.

[3] Bell Atlantic's petition, p. 5, incorrectly asserts that some of these provisions are permanent. Section 160 of the 1996 Act, 47 U.S.C. §160, specifically allows the FCC to forbear from applying provisions of the Act. The FCC can forbear from applying sections 272-275 if it determines that enforcement is not necessary. The FCC can forbear from applying section 271 if it determines that the requirements of that section have been fully implemented.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE PETITIONS DO NOT RAISE A NOVEL QUESTION OF NATIONAL IMPORTANCE

Petitioner SBC asserts that this Court should grant certiorari because the 1996 Act is a "major enactment" (*see* SBC petition at pp. 29-30). When this Court stated that the 1996 Telecommunications Act is "an unusually important legislative enactment," (*Reno v. American Civil Liberties Union*, 117 S.Ct. 2329, 2337 (1997)), it surely did not intend that every possible issue in each section warranted this Court's review.

The BOCs' failure to open their markets and meet the conditions for providing in-region interLATA services does not transform a decision applying well established precedent into one of national importance. If BOCs want to provide long-distance telephone service in-region, they merely need to open their local telephone markets and meet the conditions in the Special Provisions.

A. The Fifth Circuit's Decision Applies Well Established Principles

A federal statute, as an act of Congress, is only to be overturned "for the most compelling constitutional reasons." *U.S. ex rel. Kelly v. Boeing Co.*, 9 F.3d 743, 747 (9th Cir. 1993), *citing*, *Mistretta v. United States*, 488 U.S. 361, 384 (1989). When a fundamental constitutional right is not at stake, a statute will be overturned only if it is not "rationally-related to a legitimate public purpose." *United States v. Carlton*, 512 U.S. 26, 28 (1994).

The Special Provisions are related to a legitimate public purpose - removing impediments to competition in telecommunications markets. They were not adopted as punitive or discriminatory measures.

These provisions represent a constitutional exercise of Congress' power.

1. The Telecommunications Act's Special Provisions Do Not Violate the Bill of Attainder Clause

The Fifth Circuit correctly held that sections 271-275 of the Telecommunications Act do not represent a bill of attainder. U.S. Const. art. I, §10, cl. 1. This Court has clearly established that a bill of attainder requires three elements: (a) punishment; (b) specification; and (c) the lack of a trial. *Selective Serv. Sys. v. Minnesota Public Interest Research Group*, 468 U.S. 841, 846-847 (1984); *Nixon v. Administrator of Gen'l Servs.*, 433 U.S. 425, 468 (1977).[4] As this Court stated in *Plaut v. Spendthrift Farms*, 514 U.S. 211, 239 n. 9 (1995):

> Even laws that impose a duty or liability upon a single individual or firm are not on that account invalid - or else we would not have the extensive jurisprudence that we do concerning the Bill of Attainder Clause, including cases which say that it requires not merely "singling out" but also "*punishment*," see *e.g.*, *United States v. Lovett*, 328 U.S. 303, 315-18 (1946), and a case which says that Congress may legislate "a legitimate class of one," *Nixon v. Administrator of General Services*, 433 U.S. 425, 472 (1977).

The Fifth Circuit applied this test and correctly determined that there was no violation of the Bill of Attainder Clause.

---

[4] State and federal statutes have rarely failed the test of the Bill of Attainder Clause. *See* Lehmann, *The Bill of Attainder Doctrine: A Survey of Decisional Law*, 5 Hastings Const. L.Q. 767 (1973). In fact, between 1868 and 1965, the U.S. Supreme Court voided only two state and two federal enactments under the Bill of Attainder Clause (*Id.* at 929). The 1965 case of *United States v. Brown*, 381 U.S. 437 (1965), was the fifth (and last) time this Court found a statute in violation of the clause.

The petitioners would have this Court ignore the three part test, including the need for punishment, on the ground that because the Special Provisions apply only to BOCs they are an unconstitutional bill of attainder (*see* SBC petition at p. 20; Bell Atlantic (BA) petition at pp. 10-16).[5] However, this Court has clearly required that more than specificity be found.[6] *See, Nixon*, 433 U.S. at 471 n. 33 ("the mere specificity of law does not call into play the Bill of Attainder Clause.") Thus, that the Special Provisions apply only to the largest providers of local telephone service (BOCs) is not sufficient for a bill of attainder violation to be found.[7]

---

[5] The Special Provisions relate only to BOCs due to the BOCs' unique characteristics. The BOCs have been and continue to be subject to regulation because their business affects the public interest, and they wield inordinate power in the marketplace by virtue of their control over local telephone service in large areas across the country. Congress noted that the BOCs alone exercise immense local exchange monopoly power concentrated throughout a vast geographic region. H.R. Rep. No. 103-559, pt. 2, at 93 (1994). In fact, the court in *United States v. GTE Corp.*, 603 F. Supp. 730, 737 (D.D.C. 1984), distinguished BOCs from other carriers, subjecting other carriers, specifically GTE, to different restrictions. Moreover, only BOCs were subject to the MFJ. As noted in *United States v. Brown*, 381 U.S. 437, 454 (1965), as legislation can require that a person who possesses certain characteristics must abstain from certain activities, legislation can use a shorthand phrase to summarize the characteristics with which it is concerned. Congress used "BOCs" as a shorthand way to reflect their unique characteristics.

[6] In *Nixon, supra*, this Court addressed a statute regarding the disposition of President Nixon's records. The statute applied to no other records, and repeatedly referred to President Nixon by name. This Court rejected the argument that Congress' singling out individuals was unconstitutional, because this "view would cripple the very process of legislating, for any individual or group that is made the subject of adverse legislation can complain that the lawmakers could and should have defined the relevant affected class at a greater level of generality." *Id.* at 470. The Court concluded that Congress' motivation was not punitive. Thus, there was no bill of attainder.

[7] Courts have also rejected bill of attainder challenges to statutes imposing burdens on specific corporations. In *Fresno Rifle & Pistol Club, Inc. v. Van de Kamp*, 965 F.2d 723, 728 (9th Cir. 1992), the court held that

a. The Bell Operating Companies Have Not Been Punished

The fact that a party may feel burdened by federal action does not mean the party has been "punished." *Selective Serv. Sys. v. Minnesota*, 468 U.S. at 851; *Nixon v. Administrator*, 433 U.S. at 470, citing *United States v. Lovett*, 328 U.S. 303, 324 (1946) (Frankfurter, J., concurring) ("Figuratively speaking all discomforting action may be deemed punishment because it deprives of what would otherwise be enjoyed. But there may be reasons other than punitive for such deprivation.") As a result, there are three necessary inquiries as to whether a statute inflicts forbidden punishment: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes"; and (3) whether the legislative record "evinces a Congressional intent to punish." *Nixon*, 433 U.S. at 473, 475-6, 478; *Selective Serv. v. Minnesota*, 468 U.S. at 852. The Fifth Circuit made these inquiries, and correctly determined that the required element of punishment was not present. *SBC v. Federal Communications Comm'n*, 154 F.3d. 226, 242-44 (5th Cir. 1998).

---

a statute which specifically prohibited the manufacture of guns by certain corporations (citing the guns' trade names) was not an unconstitutional bill of attainder. Despite the argument of specificity, the court found that there was no intent to punish. In *United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1226-8 (D.R.I. 1982), a statute required the plaintiff to post a seven figure bond. The court noted that earmarking of a person or corporation did not automatically offend the bill of attainder, if it was rational. The court further noted that the statute's specific designation of the plaintiff, though "not representing an ideal choice of statutory language, may be read to designate a legitimate class of one, and does not *per se* constitute an impermissible singling out."

i. Sections 271-275 Do Not Fall Within The Historical Meaning of Punishment

The concept of "attainder" has historically included such actions as legislative passage of a death sentence, forfeiture of property rights, imprisonment, abandonment, or the barring of clergymen and attorneys from practice. *Cummings v. State of Missouri*, 71 U.S. (4 Wall) 277, 327-332 (1866); *Ex parte Garland*, 71 U.S. (4 Wall) 333, 380 (1866); *see Nixon v. Administrator*, 433 U.S. at 474. Similarly, legislative enactments barring individuals from government employment or preventing persons who are, or were, Communists from working as officers of labor unions violate the Bill of Attainder Clause. *United States v. Lovett*, 328 U.S. at 317-318; *United States v. Brown*, 381 U.S. 437, 441 (1965).[8]

The Special Provisions constitute permissible economic regulation. Rather than punish the BOCs, the Act offers them opportunities categorically denied them under the MFJ; that is, the chance to compete in the interstate telecommunications markets. The Bill of Attainder Clause does not impede Congress from imposing restrictions on the manner in which a corporation does business.[9]

---

[8] "Courts have consistently regarded the Bill of Attainder Clause... and the principle of the separation of powers only as protection for individual persons and private groups, those who are peculiarly vulnerable to nonjudicial determinations of guilt." *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966). The BOCs are not such a group.

[9] As the court stated in *Long Island Lighting Co. v. Cuomo*, 666 F. Supp. 370, 403 (N.D.N.Y. 1987), *vacated as moot*, 888 F.2d 230, 234 (2d Cir. 1989):

> Of course, all modern legislation regulating the economic activities of specific groups might be considered punishments, and the bill of attainder clause, if read too broadly, could be used to cripple the ability of legislators to respond to some perceived social or economic problem by imposing restrictions or limitations on individuals, corporations, or industries which are deemed responsible for the problem. Consequently, the bill of

(Footnote continued on next page)

In fact, this Court noted in *Nebbia v. New York*, 291 U.S. 502, 527 (1934), that "[t]he Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." Moreover, the courts have repeatedly held that the Constitution does not bar government from requiring regulated utilities to allow access to their facilities. *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 418 (1983); *MCI Telecommunications Corp. v. Federal Communications Comm'n*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978).

The Special Provisions are no different from any number of statutes that prohibit corporations from engaging in certain specified lines of business in order to preserve or foster competition or other economic goals. *See, e.g., Federal Communications Comm'n v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (affirming FCC regulations proscribing cross-ownership of a television station and newspaper in same market); Banking Act of 1933, 12 U.S.C. §24(7) (prohibiting banks from underwriting or issuing securities); Federal Credit Union Act, 12 U.S.C. §1759 (restricting federal credit union membership to groups having a common bond of association or occupation, or groups within a well-defined community). That specific corporations are named does not transform economic regulation into historical punishment. *See, e.g., United Nuclear Corp. v. Cannon*, 553 F. Supp. 1220, 1226-28 (D.R.I. 1982) (rejecting a bill of attainder challenge to a Rhode Island

---

attainder clause has been used sparingly in invalidating legislation. It has been applied only to legislation closely paralleling the historical characteristics of common law bills of attainder and bills of pain and penalties, the most important of which is a design to "inflict its deprivation upon the members of the political group sought to present a threat to national security" *United States v. Brown*, 381 U.S. 437, 453 (1965). Bills of attainder historically have been passed in times of war or rebellion or when some menace to domestic tranquility was perceived.

statute requiring a specific nuclear power company to post a $10 million decontamination bond). The Special Provisions are economic regulation; they do not fall within the historical meaning of punishment.

Moreover, as this Court noted in *Selective Serv. v. Minnesota*, 468 U.S. at 853, a statute that perpetually leaves open the possibility of removing the claimed "punitive" measure does not fall within the historical meaning of forbidden legislative punishment. This Court distinguished this situation from those in which past activity serves as "a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" for punishment. *Id.* at 847-48; *see Communist Party of U.S. v. Subversive Activities Control Board*, 367 U.S. 1, 87 (1961); *Cummings v. Missouri*, 71 U.S. (4 Wall) 227 (1866) (the persons in the group disqualified were defined entirely by irreversible acts committed by them). Despite Bell Atlantic's contention as to permanence (BA petition at p.5), the Special Provisions' requirements are far from irreversible. They can be met readily by a BOC's compliance with the conditions, as the restrictions are not based upon "past and ineradicable actions" rather ineligibility "is made to turn upon continuingly contemporaneous fact." *Selective Service*, 468 U.S. at 850-51; *see Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. at 87. Moreover, the Act specifically permits the FCC to forbear from applying these provisions.[10] Thus, they do not fall within the historical meaning of punishment.

ii. The Act Furthers Legitimate Non-punitive Goals

In determining whether the Bill of Attainder Clause is violated, the courts must analyze "whether the law under challenge, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes." *Nixon v.*

---

[10] 47 U.S.C. §160.

Administrator, 433 U.S. at 475-476. The Fifth Circuit correctly found that sections 271-275 further the national goal of encouraging competition for local telephone service. *SBC v. Federal Communications Comm'n*, 154 F.3d at 243-44.

The Special Provisions do not reflect any determination of guilt. Rather, they simply recognize that, absent compliance with certain conditions, the BOCs would be able to impede competition in the long distance and local markets.[11] The Special Provisions encourage the BOCs to remove impediments to competition and provide a brief period of protection from BOC entry into particularly vulnerable industries.[12]

The fact that the Special Provisions further non-punitive goals is not contested. Inasmuch as the MFJ did not apply to other LECs (*see United States v. Western Electric Co.*, 552 F. Supp. 131, 161, 226-234 (D.D.C. 1982), *aff'd sub nom., Maryland v. United States*, 460 U.S. 1001 (1983)), Congress' decision not to apply the Special Provisions to other LECs certainly does not render the Special Provisions punitive.

---

[11] These sections are designed to reduce the prices that residential and business customers pay for local telephone service and improve the quality of that service by bringing the competitive marketplace to the local telephone customer.

[12] For example, Congress noted the importance of having "local competition before allowing the local telephone monopoly into long distance." 141 Cong. Rec. H8276 (daily ed. Aug. 2, 1995) (remarks of Rep. Holden). Thus, the statute contains "provisions to ensure that the local telephone market [i]s open to competition before the RBOCs enter long distance." *Id.* at S697 (remarks of Sen. Kerry). The Senate Committee on Commerce, Science and Transportation noted that the "regulatory provisions are necessary to ensure that RBOCs will not enter the long distance industry at the expense of competition and telephone service ratepayers." S. Rep. No. 103-367, at 30 (1994).

iii. Sections 271-275 Display No Punitive Intent

This Court's third test for ascertaining "punishment" concerns whether the legislative record reflects an intent to punish. *Nixon v. Administrator*, 433 U.S. at 478-484. The necessary legislative intent to take "over the judicial function of punishing an individual for blameworthy offenses" cannot be found in the record of the debate on sections 271-275.[13] *See Nixon v. Administrator*, 433 U.S. at 479.

In *Lovett*, the only case in which the Court has invalidated a statute burdening named individuals as a bill of attainder, the Court detailed the "circumstances leading to [the statute's] passage," *id.* at 307, which included unmistakable evidence that Congress had found the named individuals "guilty" of "subversive activity" according to a definition that the committee created during a full-fledged legislative quasi-trial. *Id.* at 311. This Court has reiterated that there must be "unmistakable evidence of punitive intent" before an act of Congress may be invalidated on this basis. *Selective Service*, 468 U.S. at 855 n. 15; *see Flemming v. Nestor*, 363 U.S. 603, 619 (1960).[14]

The lack of punitive intent is fatal to the petitioners. The petitioners do not contend that the Special Provisions reflect a congressional intent to punish, nor could they because the BOCs have more business freedom than they had before the Act.

---

[13] *See* footnote 12, *supra*. The 1996 Act sought to "open all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. at 124. *See also*, footnote 19, *infra*.

[14] Even when certain prophylactic measures fall within the historical meaning of punishment, they are otherwise regarded where they have nonpunitive goals. *See, e.g., Hawker v. New York*, 170 U.S. 189 (1898); *DeVeau v. Braisted*, 363 U.S. 144 (1960).

b. The Fifth Circuit's Decision is Consistent With Relevant Precedent And the Protections Provided By The Bill of Attainder Clause.

As noted above, the Fifth Circuit properly determined that the Special Provisions are not punitive because, among other things, they do not impose a perpetual bar on the BOCs' entry into any avocation. *SBC v. Federal Communications Comm'n,* 154 F.3d at 242; *see Selective Service, supra.* Thus, the court broke absolutely no new ground in rejecting the BOCs' bill of attainder argument. The Fifth Circuit's recognition of the appropriateness of the "prophylactic exception," *id.* at 242, is supported by the nonpunitive congressional intent and legislative purposes.

Thus, the Fifth Circuit applied this Court's holding in *Selective Service, supra,* when it found that: 1) the Special Provisions are not punitive as they do not impose a perpetual bar on the BOCs' entry into any of life's avocations; 2) the Special Provisions are not punishment because they serve a nonpunitive purpose; 3) the Special Provisions are not punitive because neither their terms nor their legislative history demonstrates evidence of punitive intent necessary to establish a bill of attainder; and 4) the Special Provisions are not punitive as they are part of a larger *quid pro quo.*[15] *SBC*

---

[15] It must be noted, however, that there was no "*quid pro quo*" because when Congress provided BOCs the right to some relief from the MFJ it did not take away any right from the BOCs. Rather, the BOCs were subject to competition before the 1996 Act; no company has the right to a monopoly. *See Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 139 (1939) ("[t]he franchise to exist as a corporation, and to function as a public utility . . . creates no right to be free of competition" (footnote omitted)); *American Paper Inst., Inc. v. American Electric Power Serv. Corp.*, 461 U.S. 402, 418 (1983); *MCI Telecommunications Corp. v. Federal Communications Comm'n*, 561 F.2d 365 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1040 (1978). The 1996 Act merely provided BOCs with an incentive to do that which they were required to do.

v. Federal Communications Comm'n, 154 F.3d at 242-44. As set forth above, these judgments are well supported by precedent.

c. This Court Should Deny Review As It Has Clearly And Repeatedly Set Forth The Bill Of Attainder Test And The Fifth Circuit's Decision Complies With That Test

The petitioners assert that this Court must clear up the claimed "confusion" as to the law concerning bill of attainder (SBC petition at pp. 27-29; *see* BA petition at pp. 16-17). There is no conflict, however, among the federal courts.

The court in *Bellsouth Corp. v. Federal Communications Comm'n*, 144 F.3d 58 (D.C. Cir. 1998),[16] applied this Court's criteria and found that Section 274, one of the Special Provisions at issue here, was not a bill of attainder because it was not punitive. The result and rationale in *Bellsouth* are consistent with the Fifth Circuit's decision and this Court's holdings.[17] Thus, this Court's criteria for a bill of attainder are clear, and neither further review nor clarification is warranted.

2. The Special Provisions Do Not Violate The Separation Of Powers Clause

Petitioners' argument that the Special Provisions violate the separation of powers because they specifically apply to the BOCs lacks merit. (BA petition at pp. 18-19; *see* SBC petition at p. 26). The majority

---

[16] Petitions for rehearing pending.

[17] The petitioners' mischaracterize as "uncertainty" the Fifth Circuit's discussion of the history of this Court's decisions in bill of attainder cases. The Fifth Circuit's decision complies with the criteria set forth by this Court in its most recent decisions, *Nixon* and *Selective Service*.

of this Court in *Plaut v. Spendthrift Farms*, 514 U.S. 211, 238 (1995), rejected a very similar argument, stating:

> The nub of that infringement [separation of powers] consists *not* of the Legislature's acting in a particularized and hence (according to the concurrence) nonlegislative fashion; but rather of the Legislature's nullifying prior, authoritative judicial action.

The Court further noted that the premise, propounded here by Bell Atlantic, that there is something wrong with particularized legislation, is questionable. *Id.* at n. 9. This Court has upheld congressional action affecting the rights of specific groups. *See* Soldiers' and Sailors' Civil Relief Act of 1940, 54 Stat. 1178, 50 U.S.C. App. 520(4) (prospectively authorizing courts to reopen judgments against members of the Armed Forces entered while they were on active duty); *Robertson v. Seattle Audubon Society*, 503 U.S. 429, 440 (1992) (Court unanimously rejected a separation of powers challenge to legislation enacted specifically to change the law to resolve two pending disputes, which legislation identified the parties by name and docket number). Thus, the petitioners' separation of powers argument was properly rejected by the Fifth Circuit and does not merit this Court's review.

The Special Provisions are prospective in nature, do not reverse any final judicial determinations, and do not direct that courts make certain findings of fact or decisions. As this Court stated in *Plaut v. Spendthrift Farms*, 514 U.S. at 234, "[t]he finality that a court can pronounce is no more than what the law in existence at the time will permit it to pronounce. If the law then applicable says that the judgment may be reopened for certain reasons, that limitation is built into the judgment itself, and its finality is so conditioned."

3. The Petitioners' Equal Protection Claim Does Not Present A Question Warranting This Court's Review

Petitioner Bell Atlantic argues that the Fifth Circuit erred when it applied the well established deferential "rational basis" review to the Special Provisions (BA petition at p. 24). It is well settled that federal legislation regulating economic activity passes equal protection muster as long as there is a rational basis for a challenged classification. *See, e.g., Federal Communications Comm'n v. Beach Communications, Inc.*, 508 U.S. 307, 313 (1993); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (when economic regulation is challenged as violating the equal protection clause, "this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations"); *Lehnhausen v. Lakeshore Auto Parts Co.*, 410 U.S. 356 (1973) (unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, the Court's decisions presume the constitutionality of statutory discriminations and require only that the classification challenged be rationally related to a legitimate interest). The assertion that this economic legislation violates the equal protection clause because it applies only to BOCs is incorrect. *See, e.g., Erb v. Morasch*, 177 U.S. 584, 586-87 (1900) (rejecting an equal protection challenge to a single railroad); *Maine Central R.R. Co. v. Brotherhood of Maintenance of Way Employees*, 813 F.2d 484, 488-91 (1st Cir. 1987).

The BOCs were the only ones subject to the MFJ, and the only ones found by the House Judiciary Committee to exercise immense local exchange monopoly power concentrated throughout a vast geographic region.[18] Thus, they are a distinct class. Because the BOCs, as a class, are uniquely situated under the MFJ, and conduct the

---

[18] H.R. Rep. No. 103-559, pt. 2, at 93 (1994); H.R. Rep. No. 104-203, pt. 1, at 32 (1995).

same business in the same way,[19] subjecting them to the same restrictions certainly does not violate the equal protection guarantee. *Cf. Atchison, T. & S.F. Ry. v. Matthews,* 174 U.S. 96, 103-104 (1899) ("the equal protection guarantee . . . forbids the legislature to select a person, natural or artificial, and impose upon him burdens and liabilities which are not cast upon others similarly situated.") Moreover, in advancing the vital public purpose of promoting fair and open competition, the Special Provisions serve the public interest. *See id.* at 104-106.

B. Sections 271-275 Cannot Be Severed From The Act

Bell Atlantic argues that the Special Provisions are severable from the rest of the Act (BA petition at p. 28). This Court has established that provisions of a statute may not be severed where it "is evident that the Legislature would not have enacted those provisions which are within its power" absent the provisions sought to be held invalid. *Alaska Airlines, Inc. v. Brock,* 480 U.S. 678, 684 (1987).

Section 601(a)(1) of the Act prospectively terminated the effect of the MFJ, and specifically replaced those restrictions with the restrictions and conditions in the 1996 Act. These transitional regulations were specifically created to address the competitive implications of terminating the MFJ.[20] Therefore, Bell Atlantic's assertion that the Special Provisions were not a necessary requirement for Congress to adopt the 1996 Act is baseless (*See* BA petition at p. 24). The

---

[19] "BOCs and their affiliates . . . uniquely are seeking release from restrictions imposed under the MFJ." H.R. Rep. No. 103-559, pt. 1, at 131 (1994).

[20] The Senate Committee on Commerce, Science and Transportation explained that these measures were designed to "replace the current antitrust prohibition with regulatory safeguards . . ." S. Rep. No. 103-367, at 30 (1994).

legislative history of this Act shows Congress intended the BOCs to enter the long distance business only if they opened their local networks to competition. Thus, Congress specifically replaced the MFJ's restrictions with the Special Provisions of the Act.[21] Inasmuch as Congress inextricably intertwined these sections to promote competition, severance of sections 271-275 would be improper.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

LAWRENCE G. MALONE
General Counsel to the
Public Service Commission
Of the State of New York
Three Empire Plaza
Albany, NY 12223-1350
(518) 474-2510

December 18, 1998

---

[21] *See* footnote 12 *supra;* 142 Cong. Rec. S688 (remarks of Sen. Hollings) ("[T]he RBOCs should not be permitted to enter the long-distance market while they retain a monopoly over local telephone service. . . . I am pleased that the conference agreement recognizes that the RBOCs must open their networks to competition prior to their entry into long-distance.") As stated by Senator Kerry, "Removing the restrictions under any other circumstances would give the local telephone company the incentive and ability to recreate the vertical monopoly that the Department of Justice and many others worked so long and hard to dismantle." 141 Cong. Rec. S.8138 (daily ed. June 12, 1996).